

**United States District Court  
for the Western District of Oklahoma**

Charles F. Warner, *et al.*,

Plaintiffs,

v.

No. CIV-14-665-F

Kevin J. Gross, *et al.*,

Defendants.

**Motion in Limine  
and Brief in Support**

COME NOW Plaintiffs Warner, Glossip, Grant, and Cole and move to limit the testimony of Defendants' expert R. Lee Evans to his area of expertise. In support of this motion, Plaintiffs state as follows:

1. Defendants' Expert Report and attachments identify R. Lee Evans as having a Ph.D. in pharmacy and being a board certified psychiatric pharmacist. (Letter to J. Hadden from R. Evans dated Dec. 2, 2014, Defs' Bates No. 6368-6372.)

2. Dr. Evans was asked by Defendants to address the "pharmacological effects of the drugs used in the execution protocol for the State of Oklahoma." (Evans letter at 6368.) Plaintiffs do not challenge Dr. Evans' qualifications to address the pharmacological effects of drugs.

3. Dr. Evans' proposed testimony and opinion, however, extend beyond

the pharmacological effects of drugs and beyond knowledge acquired in his special discipline. Dr. Evans does not have sufficient specialized knowledge to express any opinion or conclusion about movements of “brain dead” patients. (See Evans Letter at 6372)(opining on “involuntary movements”). He is unqualified to postulate regarding an offenders’ movements or suggest causes for such movements. Dr. Evans has no training, education, experience or skill to reach an opinion regarding this subject. He is not qualified to offer such opinions and his unqualified opinions offer no assistance to this Court. *Kumho Tire Col, Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

4. Dr. Evans’ proposed testimony and opinion on “involuntary movements” should also be excluded because it does not satisfy the demands of Rule 702 of the Federal Rules of Evidence. His proposed testimony and opinions are not “based upon sufficient facts or data,” are not “the product of reliable principles and methods,” and he has not reliably applied scientific principles and methods to the facts of this case.

5. Dr. Evans’ testimony and opinion regarding “involuntary movements” is based upon the reasoning from a brief observation note published in The American Journal of Medicine from a study by Argentinian physicians regarding spontaneous and reflex movements in 107 brain dead patients.

6. Dr. Evans offers no source for his statement that “[s]ome involuntary motor movements may be observed during normal anesthesia and have been observed during execution by injection.” (Evans’ letter at 6372.)

When an expert’s testimony and opinions are challenged under *Daubert* and *Kumho*, as they are here, it is the proponent of the testimony who bears the burden to establish the admissibility of the pertinent evidence by a preponderance of the evidence. *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970, n. 4 (10th Cir. 2001). See Fed. R. Evid 702, Advisory Committee notes. This Court’s gatekeeper obligations under *Daubert* and Rule 702 are set forth extensively in *Graves v. Mazda Motor Corp.*, 675 F. Supp 2d 1082, 1090-1095 (W.D. Okla. 2009), *aff’d*, 405 Fed. Appx. 296 (2010).

Wherefore, Plaintiffs request that this Court limit the testimony of Defendants’ expert to evidence within his expertise and further prevent the admission of unreliable evidence that goes beyond Dr. Evans’ knowledge, skill, and education.

Respectfully submitted,

s/ Patti Palmer Ghezzi

Patti Palmer Ghezzi

OBA # 6875

Assistant Federal Public Defender

215 Dean A. McGee Ave., Suite 707

Oklahoma City, OK 73102

phone: 405-609-5975

fax: 405-609-5976

email: patti\_ghezzi@fd.org

*Attorney for Plaintiffs Cole, Cuesta-Rodriguez, Davis, Fairchild, Grant, Grissom, Harmon, Johnson, Littlejohn, Pavatt, Simpson, and Underwood*

s/ Gary Peterson

Gary Peterson

OBA # 7068

211 N. Robinson Ave., Ste. 450 South

Two Leadership Square

Oklahoma City, OK 73102

phone: 405-606-3367

fax: 866-628-0506

email: gp@garypeterson.com

*Attorney for Plaintiff Warner*

s/ Randy A. Bauman

Randy A. Bauman

OBA # 610

Assistant Federal Public Defender

215 Dean A. McGee Ave., Suite 707

Oklahoma City, OK 73102

phone: 405-609-5975

fax: 405-609-5976

email: randy\_bauman@fd.org

*Attorney for Plaintiffs Cole, Cuesta-Rodriguez, Davis, Fairchild, Grant, Grissom, Harmon, Johnson, Littlejohn, Pavatt, Simpson, and Underwood*

s/ Mark Henricksen

Mark Henricksen  
OBA # 4102  
Henricksen & Henricksen  
600 N. Walker Ave., Ste. 200  
Oklahoma City, OK 73102  
phone: 405-609-1970  
fax: 405-609-1973  
email: mark@henricksenlaw.com  
*Attorney for Plaintiffs Andrew,  
Glossip, and Jackson*

s/ David Autry

David B. Autry  
OBA # 11600  
1021 NW 16th Street  
Oklahoma City, OK 73106  
phone: 405-521-9600  
fax: 405-521-9669  
Email: dbautry44@hotmail.com  
*Attorney for Plaintiff Coddington*

s/ Fred Staggs

Fred L. Staggs  
OBA # 8534  
510 NW 17th St.  
Oklahoma City, OK 73013  
phone: 405-990-5523  
Email: staggs law@aol.com  
*Attorney for Plaintiff Mitchell*

s/ Lanita Henricksen

Lanita Henricksen  
OBA # 15016  
Henricksen & Henricksen  
600 N. Walker Ave., Ste. 200  
Oklahoma City, OK 73102  
phone: 405-609-1970  
fax: 405-609-1973  
email: lanita.henricksen@coxinet.net  
*Attorney for Plaintiffs Hancock and Warner*

s/ Mark Barrett

Mark H. Barrett  
OBA # 557  
P.O. Box 896  
Norman, OK 73070  
phone: 405-364-8367  
fax: 405-364-8329  
Email: barrettlawoffice@gmail.com  
*Attorney for Plaintiff Jones*

s/ Dale Baich

s/ Robin Konrad

Dale A. Baich  
Ohio Bar # 0025070  
Robin C. Konrad  
Ala. Bar # 2194-N76K  
Assistant Federal Public Defenders  
850 West Adams St., Ste. 201  
Phoenix, AZ 85007  
phone: 602-382-2816  
fax: 602-889-3960  
email: dale\_baich@fd.org  
email: robin\_konrad@fd.org  
*Attorneys for Plaintiff Wood*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of December, 2014, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

JOHN D. HADDEN, OBA # 18716  
JEB E. JOSEPH, OBA # 19137  
AARON J. STEWART, OBA # 31721  
Assistant Attorneys General  
Oklahoma Attorney General's Office  
Litigation Division  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
phone: (405) 521-3921  
fax: (405) 521-4518  
email: john.hadden@oag.ok.gov  
email: jeb.joseph@oag.ok.gov  
email: aaron.stewart@oag.ok.gov

*Attorneys for Defendants Burrage, Gross, Haynes, Henke, Neal, Patton, Roach,  
Trammell and Ware*

s/ Patti Palmer Ghezzi

Patti Palmer Ghezzi  
Assistant Federal Public Defender  
Western District of Oklahoma